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No. 76-563

In the Supreme Court of the United States

OCTOBER TERM, 1976

CANADIAN PARKHILL PIPE STRINGING, LTD., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The decision and order of the district court (Pet. App. A13-A14), adopting the special master's report (Pet. App. A15-A43), are not officially reported. The opinion of the court of appeals (Pet. App. A1-A12) is reported at 540 F. 2d 258.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1976. The petition for a writ of certiorari was filed on October 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners had the opportunity for a fair hearing on their claims to ownership of an escrow fund

representing the proceeds of sale of assets seized by the Internal Revenue Service.

2. Whether the decision below correctly held that petitioners were alter egos of one another so that the assets of two corporations were available to satisfy the tax assessments against a third.

STATEMENT

Petitioners are three related corporations engaged in various aspects of the pipeline construction business. They are: (1) Canadian Parkhill Pipe Stringing, Ltd. ("LTD"), a Canadian corporation laying pipelines in Canada; (2) Canadian Parkhill Pipe Stringing, Inc. ("INC"), a wholly-owned United States subsidiary of LTD, conducting the same operations in the United States; and (3) Canadian Parkhill Construction Equipment, Ltd. ("Construction"), a second subsidiary of LTD, which leased construction equipment primarily to INC (Pet. App. A1).

As a result of losses from its construction projects, INC became unable to pay employee withholding taxes which it reported to be due for the third quarter of 1969. In order to raise funds with which to pay INC's taxes, Construction borrowed $600,000 from Avco Delta Corporation Ltd. Construction secured the loan by giving a chattel mortgage on 29 pieces of heavy construction equipment. While Construction covenanted that it owned the equipment, LTD and INC guaranteed payment of Construction's debt to Avco Delta and agreed to indemnify that company from any losses arising from the transaction (Pet. App. A2).

Despite the loan, INC's tax liabilities were not paid. When the proceeds of the loan were deposited in the Royal Bank of Toronto, that bank appropriated the funds as a set off against a guarantee of an unpaid obligation of LTD. LTD had advanced the proceeds of that previous

obligation to INC as a loan in connection with a particular construction project (Pet. App. A2-A3).

In February 1970, the Internal Revenue Service seized all of the equipment which had been used by INC on a particular construction job for Natural Gas Pipeline Company. It also served notices of levy upon Natural Gas Pipeline Company on the retainage it held on the project. Pursuant to an agreement among the parties that claimed an interest in the construction equipment, the equipment was sold and the proceeds were placed in escrow (Pet. App. A3).

Avco Delta claimed priority for its mortgagee's claim on the construction equipment and sued the United States and the various Parkhill companies (LTD, INC, and Construction). Avco Delta prevailed and was paid the amount of its claim. However, the sale of the mortgaged equipment produced an excess of approximately $600,000 over the amount of the mortgage. It is the ownership of that $600,000 fund that is at issue here (Pet. App. A3).

Petitioners applied to the district court for a release of funds for the purpose of paying their counsel to maintain the litigation. The district court ordered the funds released in advance of trial. However, the court of appeals reversed (484 F. 2d 692) and this Court denied certiorari (415 U.S. 931). The district court thereupon appointed a special master to hear the remaining issues in the case including the amount of the tax liability of INC and whether the assets of LTD and Construction could be used to satisfy the tax liabilities of INC.[1]

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[1]Although the Parkhill companies asserted that the seized equipment belonged to LTD and Construction, the government claimed the transfer of this equipment from INC to the related companies

The district court adopted the master's report (Pet. App. A15-A43) in all respects (Pet. App. A13-A14). It upheld the tax assessments against INC and found there were taxes, interest, and penalties owing of $2,470,233.98, plus interest and penalties accruing after September 23, 1974 (Pet. App. A5, A41). The master's report also concluded that petitioners should be considered as one corporate entity so that the assets of Construction and LTD should be available to pay the tax liability of INC (Pet. App. A41). The district court thereupon ordered the $600,000 fund paid to the government (Pet. App. A14).

Counsel for petitioners declined to participate in the hearing before the special master (Pet. App. A5). However, they filed extensive and specific objections to the

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was a sham and a fraud on creditors. The court of appeals summarized the master's findings with respect to the transfers (Pet. App. A12) as follows:

> He found that LTD took title to certain items of equipment although INC apparently paid the purchase price; the companies' president instructed an attorney by letter to take such steps as were necessary to show clear title to certain pieces of equipment in CONSTRUCTION although some of the pieces had been purchased by INC and some by LTD; sometime after that letter, a bill of sale was prepared dated March 15, 1968, purporting to transfer certain items of equipment for the stated consideration of $1.00 and other valuable consideration; one of the items listed on the bill of sale was not manufactured until sometime in 1969; sometime after the letter a bill of sale dated October 15, 1969, was prepared which purported to convey the equipment listed in the bill of sale dated March 15, 1968, and four other items to CONSTRUCTION (From LTD) for the stated consideration of $1.00 and other valuable consideration; the equipment on the bill of sale dated October 15, 1969, included equipment purchased by INC which had a market value in excess of $900,000; the bills of sale dated March 15, 1968, and October 15, 1969, were not reflected upon any books, records, or tax returns of any of the three companies; and during the fourth quarter of 1969 INC's liabilities far exceeded its assets. [Footnote omitted.]

special master's report in the district court. After hearing oral argument, the district court concluded that the special master's report "is eminently sound in each particular on which objection or comment has been made, as well as in all other respects, and that therefore it should be adopted by the court" (Pet. App. A6). The district court further held that the constitutional rights of the Parkhill corporations were not violated (Pet. App. A6). The court of appeals affirmed (Pet. App. A1-A12).

ARGUMENT

1. Petitioners renew their argument (Pet. 12-13), made before the court of appeals and in their first petition for certiorari, that the district court's refusal to release money from the escrow fund to pay their costs of litigation was a denial of due process because they did not have the funds to hire experts and conduct discovery. But the court of appeals correctly rejected this contention in the prior proceeding before it, observing that "[t]he contention that the Government's actions will cause an unfair trial in the future is * * * capable of determination only after that trial takes place" (484 F. 2d 692, 707).

The court of appeals therefore implicitly assumed that petitioners would make an attempt on remand to assert their claim to the escrow fund. But petitioners did not do so. Although they argue that they did not have the necessary funds to participate in the hearing before the special master, petitioners did not establish that they had no assets in Canada (see Pet. App. A3, n. 2). Moreover, petitioners did present objections to the district court.

As the court of appeals noted (Pet. App. A9), petitioners' refusal to participate in the hearing before the special master arose from their Canadian principal's reluctance to enter the United States and thereby risk

criminal prosecution. Under these circumstances the court of appeals correctly concluded that "[t]he companies made the tactical choice not to participate in the hearing and cannot complain now that they were denied due process" (Pet. App. A9).

2. Petitioners further argue (Pet. 17-18) that their failure to obtain a "meaningful and timely hearing" deprived them of due process. But if petitioners wanted to establish that the seized property belonged to LTD and Construction and could not be used to satisfy the unpaid tax assessment against INC, they could have brought an immediate action for wrongful levy under Section 7426 of the Internal Revenue Code (26 U.S.C.). There is accordingly no basis to petitioners' contention that the proceedings below did not afford them a "meaningful" opportunity to be heard on their claim.

3. Finally, petitioners attack the ruling that LTD and Construction were liable for the tax debts of INC (Pet. 18-24). However, it is well settled that one corporation may be liable for the debts of another where there is: (1) control to such a degree that the debtor has become the mere instrumentality of the controlling corporation, (2) fraud or wrong by the controlling corporation (such as stripping the subsidiary of its assets) and (3) unjust loss to the claimant, such as insolvency of the debtor corporation. See, *e.g.*, *Steven* v. *Roscoe Turner Aeronautical Corp.*, 324 F. 2d 157, 160 (C.A. 7); *Bernardin, Inc.* v. *Midland Oil Corp.*, 520 F. 2d 771, 775 (C.A. 7); *Whayne* v. *Transportation Management Service, Inc.*, 252 F. Supp. 573, 577 (E.D. Pa.), affirmed *sub nom. Whayne* v. *M.V. Shuttler, Inc.*, 397 F. 2d 287 (C.A. 3), certiorari denied, 393 U.S. 978. See also *Berger* v. *Columbia Broadcasting System, Inc.*, 453 F. 2d 991, 994-995 (C.A. 5), certiorari denied, 409 U.S. 848; *P.F. Collier & Son Corp.* v. *Federal Trade Commission*, 427 F. 2d 261, 266-267 (C.A. 6), certiorari denied, 400 U.S. 926.

As the court of appeals observed, the special master's findings amply supported the conclusion that the companies were instrumentalities of each other (see Pet. App. A11). Moreover, he found that LTD took title to certain items of equipment although INC apparently paid the purchase price, that certain equipment purchased by INC and LTD was put in the name of Construction, and that various bills of sale purporting to transfer equipment among the corporations were fabrications in order to obtain the loan from Avco Delta on the basis of overstated net worth (see pp. 3-4, n. 1, *supra*). In view of these findings, the decision below correctly held that the corporations were operated as one entity so that the assets of LTD and Construction could be used to satisfy the tax liabilities of INC.[2]

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[2]*Moline Properties, Inc.* v. *Commissioner*, 319 U.S. 436, and *National Carbide Corp.* v. *Commissioner*, 336 U.S. 422, relied upon by petitioners (Pet. 19), are not to the contrary. Those cases present the question when a corporation will be regarded as a separate entity for purposes of reporting its income. Here, the availability of the assets of LTD and Construction rests upon a rule of creditor's rights and not of substantive tax law.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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